IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.107 OF 2003
WITH
CIVIL APPLICATION NO.131 OF 2003

Dnyanchandra Appaji Shete & Ors. .. Appellants.
Vs.
Sahebbi w/o Nijamuddin Kaji & Ors. .. Respondents.

Mr.A.V.Anturkar with Mr.G.M.Savagare for the appellants.
Mr.P.S.Dani for respondent nos.1A to 1E.

CORAM : D.B.BHOSALE, J.
DATED : 4TH SEPTEMBER, 2007.
P.C.:

. Heard learned counsel for the parties.

2. This appeal by defendant no.11 challenge the judgments of the courts below by which a suit filed by the respondents-plaintiffs stands decreed. The respondents-plaintiffs had instituted the suit for redemption of mortgage.

3. Mr.Anturkar, learned counsel for the appellants assailed the judgments of the courts below solely on the ground that the terms and conditions of the mortgage deed dated 9.9.1939 cannot be termed as a clog on equity of redemption. This issue has been answered by both the courts below holding that the terms and conditions of mortgage are a clog on equity

of redemption. Mr.Anturkar further submitted that retaintion of the amount of Rs.1,500/- by the mortgagee for construction of a well in the suit property and Rs.350/- for its improvement would not amount to a clog on equity of redemption. The appellate court in paragraph 14 has considered similar submission and has rightly answered the issue in affirmative holding that the terms of mortgage are inequitable insofar as the rights of mortgagor are concerned and, therefore, it amounts to a clog on equity of redemption. It is clear from the facts that after retaining the subtantial part of the agreed consideration hardly Rs.775/- were paid to the mortgagor. The monies paid were only 20% of the consideration. Mr.Anturkar then invited my attention to the observations in paragraph 19 so also to section 63A of the Transfer of Property Act, 1932 and submitted that a long term of 105 years by itself as a period for redemption is not necessarily a clog on equity and secondly, that condition to pay cost of the building or demolishing the same also would not amount to a clog on equity of redemption.

4. I am afraid, this arguments are not open to the appellants in view of the fact that he claims to be the purchaser of the mortgaged property from defendant no.1, original mortgagee, who never

challenged the findings of the courts below. Moreover, the case set up by the appellant - defendant no.11 that he acquired ownership by adverse possession and that he is bonafide purchaser for value without notice has also been rejected by the courts below. It may also be noticed that the plaintiffs under the decree are liable to pay market price of the building constructed by the defendants on the suit property. That apart the law is now well settled as reiterated by the Supreme Court in **Pomal Kanji Govindji V. Vrajlal Karsandas Purohit AIR 1989 Supreme Court 436**. The relevant observations in paragraph 28 of the judgment read thus:

> "28. This is the English law based on principles of equity. This is the Indian law based on justice, equity and good conscience. We reiterate that is the position. Though long-term by itself as the period for redemption, is not and phenomenal increase in the prices of real estates, in this age of population-explosion and consciousness and need for habitat, long-terms, very long-term, taken with other relevant factors, would create a presumption that it is a clog on equity of redemption. If that is the position then keeping in view the financial and economic conditions of the mortgagor, the clause obliging the payment, of interest even in case of usufructuary mortgage not periodically but at a time of ultimate reduction imposing a burden on the mortgagor to redeem, the clauses permitting construction and reconstruction of the building in this inflationary age and debiting the mortgagor with an obligation to pay for the same as a ground for redemption, amount to clog on equity."

6. In view of the settled position of law I find

absolutely no merit in the contentions urged by Mr.Anturkar, learned counsel for the appellants. Both the courts below have considered all the aspects of the matter in proper perspective. The judgments of the courts below, in my opinion, are entirely based on evidence on record which warrant no interference by this court in the second appeal. The second appeal, accordingly, stands dismissed. Consequently, the civil application is also disposed of.

(D.B.BHOSALE, J.)